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In the

Supreme Court of the United States

OCTOBER TERM, 1940

No. 811

J. H. GALE, et al.,
Petitioners,

vs.

UNION BAG & PAPER CORPORATION,
Respondent.

Petition for Certiorari to Supreme Court of the United States from Fifth Circuit Court of Appeals

---

BRIEF OF RESPONDENT UNION BAG & PAPER CORPORATION

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SUBJECT INDEX

	Page
Statement of Case	1
Questions Before the Court	3
Findings of Fact	5
Findings of Law	6
Cases Argued Contra	13
Sand and Gravel Dredge Workers Exempt	14
"Navigation" Defined	16

INDEX TO CASES CITED

Ala. Power Co. v. Ickes, 302 U. S. 464 (1), 82 L. Ed. 374	6
Ellis vs. United States, 206 U. S. 246, 51 L. Ed. 1047	7
Fleming vs. Hawkeye Button Co., 113 Fed. (2d) 22	17
Southern Pac. Co. v. Jensen, 244 U. S. 205	13
South Chicago Coal & Dock Co. v. Bassett, 308 U. S. 532	10
Warner vs. Goltra, 293 U. S. 155	12

STATUTES AND LAWS

Fair Labor Standards Act	2
U. S. C. A., Vol. 46, 713	8
Appendix "A"—Brief in Court of Appeals	19
Appendix "B"—Ruling of Adm'r. in matter of Smoot Sand & Gravel Corp. case	19

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STATEMENT OF CASE

These cases arise under the Fair Labor Standards Act.

Plaintiffs were employed as bargetenders on pulpwood barges of the Bag Company, operated on the navigable tidewaters between different points in the States of Georgia, South Carolina and Florida. They claim they come under the Wages & Hours provisions of the Act and worked more than 44 hours a week.

They sued for over-time with penalties provided by the Act.

Defendant contends that the men did not work more than 44 hours a week, and that being seamen they were expressly exempted from the Wages and Hours provisions of the Act under Section 13 (a) (3) thereof, which provides that the provisions of the Act with respect to wages and hours shall not apply to "any employee employed as a seaman."

We feel that the learned and well considered opinion of the Trial Court[1] and the Circuit Court of Appeals[2]

1—The opinion of the trial Court appears in the Printed Record pp. 97-111.

2—The opinion of the Circuit Court of Appeals, not being printed in the record, is here given, to-wit: "Foster, Circuit Judge: This case arises under the provisions of the Fair Labor Standards Act of 1938, June 25, 1938, 52 Stat. 1060, (29 U. S. C. A. §201 et sec.) Three suits were brought by nine of its employees against Union Bag and Paper Corporation, a New Jersey Corporation, to recover wages for overtime, liquidated damages and reasonable attorneys' fees, under the provisions of Sections 6-7 and 16 of the act. (29 U. S. C. A. §206-207 and 216.) The parties will be referred to as plaintiffs and defendant.

"By agreement the suits were consolidated for trial in the District Court and tried by the judge without a jury. For reasons given in a well considered opinion, Lowrimoore vs. Union Bag & Paper Corp., 30 F. Supp. 647, the court held that plaintiffs were seamen within the meaning of the act, section 13 (a) (3), and excepted from its provisions. (29 U. S. C. A. §213 (a) (3). Judgment was entered in favor of defendant. This appeal followed. The material facts are not disputed. They are as follows:

"Defendant operates a plant at Savannah, Georgia, for the making of paper bags, paper pulp, etc. The products are sold and distributed in interstate commerce. It owns a fleet of barges which brings to the plant raw materials from points in Georgia, South Carolina and Florida. Plaintiffs are employed as barge-tenders on these barges and perform the services usual to their occupation, such as attending to the lines and anchors, putting out running and mooring lights, pumping out bilge water, etc. They are furnished sleeping quarters on the barges and occupy them. They have the usual shore leave when the barges are at Savannah but are subject to call at any time in case of emergency. The barges are without motive power or stee ing gear. They are towed by tugs and then the barge tenders are under the orders of the captain of the tug.

contain ample reason and authority to sustain the judgments of these two Courts.

However, we respectfully call to the attention of this Honorable Court the following facts in the cases:

QUESTIONS BEFORE THE COURT

The Trial Court found against the plaintiffs on the law and the facts.

The Circuit Court of Appeals considered the law question only, sustaining the Lower Court in its finding that the men were "seamen" as a matter of law.

We refer to the opinion of the District Court for a statement of the facts and a review of the law more in detail.

"The word 'seaman' has a plain, ordinary meaning universally applied. Whether a person is a seaman depends upon the character of his duties. If they are maritime in character and rendered on a vessel in commerce, in navigable waters, he is a seaman. International Stevedoring Co. vs. Haverty, 272 U. S. 50.

"Congress, in connection with the general maritime statutes applying to shipping, has defined the word 'seaman' as follows: 'In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or ngaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, x x x' R. S. 4612; (46 U. S. C. A. §713).

"Practically the same definition has been adopted in respect of hospitalization of seamen. (24 U. S. C. A. §1).

"Undoubtedly, the barges were vessels engaged in commerce on navigable waters of the United States. The Robert W. Parsons, 191 U. S. 17. In Ellis vs. U. S., 206 U. S. 246, a criminal prosecution for violating the Eight Hour Law, Act of August 1, 1892, 27 Stat. 340, it was held that employees on floating dredges and scows were 'seamen' and not 'laborers' covered by the act.

"In Warner vs. Goltra, 293 U. S. 155, a case arising under the Merchant Marine Act of 1920, (46 U. S. C. A. §688) it was said:

'In a broad sense a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects the operation and welfare of the ship when she is upon a voyage.'

"This is a suit for wages, not for damages or compensation, and decisions holding certain employees to be seamen, entitled to a

In petitions for certiorari to the Supreme Court of the United States we understand that only matters of gravity and importance are considered, and where questions of fact are involved which concern only the case under consideration, the Court will not grant a writ of certiorari.

Further, that only those questions raised in the petition for certiorari will be considered. In this petition plaintiffs lay their prayer for certiorari on the question of law, upon the gound that the finding of law in the case has not been, but should be, settled by this Court. (Petition for Certiorari, page 4). In this we disagree with petitioners, as will be shown later.

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lien on the vessel for recovery of wages, are peculiarly applicable in construing the act. In the following cases it was held that workmen employed on barges and dredges having no motive power were to be considered 'seamen' and entitled ot a lien. The Alabama 19 Fed. 544; McRae vs. Bowers Dredging Co., 86 F. 344; Sou. Log Cart & Supply Co. vs. Lawrence, 86 F. 907; Wnadtke vs. Anderson, 74 F. (2d) 381. Other cases to the same effect could be cited but it is unnecessary to do so. We are not advised of any case to the contrary where the facts were similar.

"Plaintiffs cite the following decisions construing the Longshoremen's and Harbor Workers' Act, (33 U. S. C. A. §901 et sec.) in which it was held that employees working on small boats and barges were not excluded from the benefits of the act. DeWald vs. Baltimore & O. R. Co., 71 F. (2d) 810; Diomede vs. Lowe, Com'r, 87 F. (2d) 296; Moore Dry Dock Co. vs. Pillsbury, 100 F. (2d) 245. The master or a member of a crew of any vessel is excluded from the provisions of the act; 'seamen' are not. In each case the decision turned on the point that the employee was neither the master nor a member of the crew of a vessel. In Nogueira vs. N. H. & H. R. Co., 281 U. S. 128, the legislative history of the act is review and the purpose of the legislation is discussed. It is plain that it was not the intention of Congress to exclude a person who might be considered a seaman within the ordinary meaning of the word from the benefits of the act unless he were the master or a member of the crew of a vessel.

"It is immaterial that the vessels were without motive power.

FINDINGS OF FACT

The Trial Court found upon questions of fact:

1st: That the plaintiffs did not make a case upon their claim that they had worked for a period of hours per week in excess of that fixed by law. (Printed Record p. 101).

2nd: That plaintiffs were seamen under the accepted definition of the term as shown by the evidence, and therefore exempt from the operation of the Act. (Printed Record, p. 102).

While the Circuit Court of Appeals based its judgment, affirming the lower Court, upon the question that plaintiffs were "seamen" as a matter of law, yet the Trial Court sat as trior of the law and the facts

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They were engaged in commerce upon navigable waters of the United States and were within the admiralty jurisdiction of the United States. It is apparent the barge men rendered services of a maritime character. They were necessary for the operation, welfare and safety of the barges. If the tow line had parted at any time on a voyage the barge would have been helpless and might have become a total loss if the barge tender was not there to drop the anchor and otherwise look out for its safety. The same is true if there was no one to pump out the bilge water as the barge might sink from its accumulation. The other duties they perform were also necessary and usual to the navigation of the barges. To restrict their employment to a week of 44 hours and ultimately to 40 hours per week would greatly interfere with the operations of such means of transportation. Probably barge tenders would not be employed at all. It is true that they might have worked longer hours by receiving pay for the over-time, at one and one-half times the prescribed rate, but that was ther privilege and they could not have been compelled to perform services for longer hours unless they were willing. We consider that, both from the letter and the intention of the act, it is clear employees of this character, ordinarily to be considered seamen, were excepted from its provisions.

"The District Court also found that plaintiffs had failed to prove they were compelled to labor more than the maximum hours allowed by the act. In view of the conclusion reached as to the application of the law it is unnecessary to decide that question.

"The record presents no reversible error. The judgment is AFFIRMED."

(Printed Record, p. 51(a)) and the findings of fact as made by the Trial Court (pp. 99-102) "which have substantial support in the evidence, will be accepted by the reviewing Court as unassailable."

Alabama Power Co. vs. Ickes, 302 U. S. 464 (1), 82 Law Ed. 374.

Plaintiff being, therefore, concluded by the findings of fact the case is not one which would authorize the granting of a writ of certiorari by this Honorable Court.

FINDINGS OF LAW

The question of law presented in this case may be briefly said to be a question of whether a person employed upon a vessel engaged in commerce upon navigable waters of the United States, whose duties require him to protect the vessel and the cargo, and, as such, being ordinarily classed as a seaman, would become a non-seaman if the vessel is not self-propelled but is towed by a tug.

It was upon this basis that Interpretative Bulletin No. 11 was issued by the Wages & Hours Division of the Department of Labor, (see Exhibit "A," Printed Record, pp. 41-42), and it was largely upon this theory that the case was tried in the Courts below.

The question, therefore, is whether or not this Honorable Court has heretofore decided that a man so employed is or is not a "seaman."

This question was decided by this Honorable Court in the case of *Ellis vs. United States*, 206 U. S. 246, 51 L. Ed. 1047.

That case involved the eight-hour law of 1892. Appellants were indicted for working captains, mates, engineers, firemen, crane men, deck hands, scow men and others on dredges, scows and tow boats in dredging operations in Boston Harbor, for more than eight hours a day. Under that law no express exemption was made as to seamen, as in the Act under consideration. Therefore, our case is much stronger than the Ellis case.

The Court, however, in the Ellis case drew a distinction between laws governing workmen upon land and laws governing those who followed the sea, and although there was no exclusion of seamen written in that Act, this Honorable Court refused to extend the Act to admiralty subjects and reversed the Trial Court. Judge Holmes writing the opinion held that "scows and floating dredges were vessels. . . . They were within the admiralty jurisdiction of the United States." All those persons named who worked upon the dredges, tug boats and scows came within the admiralty jurisdiction of the United States as seamen, and the eight-hour law, intended for laborers and mechanics, therefore did not apply.

The dredges and scows were not self-propelled.

It is contended by plaintiffs that the decision in the Ellis case holding that such men were seamen is obiter

dictum. Plaintiffs contend that the reason for calling these men "seamen" was a change in the location in the Code of the definition of seamen given by the Act of Congress. Section 4612 R. S. (46 U. S. C. A. 713), viz:

> "In the construction of this chapter, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of this chapter may be applicable, and the term 'owner' shall be taken and understood to comprehend all the several persons, if more than one, to whom the vessel shall belong."

Whatever may have been the underlying reason for the opinion in the Ellis case, we submit that a comprehensive definition of a term given by an Act of Congress of long-standing, universally approved, and adopted by the Supreme Court of the United States may hardly be considered as "dictum." It is upon the Acts of Congress and decisions of our Courts that our citizens and industry must depend in order to know how to conduct ourselves and our businesses, and this law and these decisions long followed cannot be lightly set aside. Especially is this true in the instant case

where the Act under consideration, which we have endeavored to follow, expressly excluded "seamen" from its operation.

The definition adopted by the Statute above referred to and by the Supreme Court of the United States in the Ellis case is the definition universally accepted, as will be noted by the definition of "seamen" in statutes, dictionaries, text books and Court decisions, referred to on pages 19 to 31 of the Respondent's Brief in the Circuit Court of Appeals, which is attached hereto as Appendix "A."

The application of the definition of seaman above quoted to those persons employed on dredges and scows (vessels not self-propelled) in the Ellis case was not obiter dictum. It was essential to the finding in the case. Indictment No. 666 was for employment of the "captain, mate, engineer, and foreman of a tug that towed a scow, etc. and a man in charge of the scow." 206 U. S. 258.

The question in the Ellis case was whether the men were seamen and under admiralty laws or whether they were laborers and mechanics working under the Statute which limited their hours of work. If they were seamen the judgment in the Ellis case should be reversed, for the admiralty law applied. If not, then the conviction stood.

The Court reversed the judgment upon the ground the men were seamen. This was the controlling point

in the case and the finding was in no sense obiter dictum.

In *South Chicago Coal & Dock Company, et al. vs. Bassett,* (308 U. S. 532), decided by this Court on February 26th, 1940, the Commissioner had found as a fact that the employee there involved performed no maritime duties and was not a seaman. The District Court reversed this award, and the Circuit Court of Appeals had affirmed the lower Court. The precise holding of the Circuit Court of Appeals was that the Court was bound by the Commissioner's finding of fact. The Circuit Court did go on to say that even had it undertaken a review of the facts, it would have found the facts in accordance with the Commissioner's conclusion. An examination of the opinion, and particularly of the testimony set forth in the footnotes thereto, will show that upon the uncontradicted evidence the employee in that case was little, if anything, more than a mere day laborer. His situation and duties were so different from those of these barge tenders that the case cannot be taken as a case in point here. Besides, it must always be remembered that the language of the Longshoremen's and Harbor Workers' Compensation Act and the Wages and Hours Act is, as pointed out in the *DeWald* case, *supra,* entirely dissimilar.

The ruling of the Circuit Court of Appeals was affirmed by this Court. Chief Justice Hughes who delivered the opinion placed great emphasis upon the

precise language of the statute under consideration and called particular attention to the distinction between the word "seamen" and the phrase "a master or member of a crew," pointing out that the original draft of the bill in that instance exempted seamen and that it was in the final passage of the bill that the words "a master or member of a crew" were substituted for the word "seamen." The Chief Justice said:

> "We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were 'seamen.' International Stevedoring Company v. Haverty, 272 U. S. 50; Northern Coal Co. v. Strand, 278 U. S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. Southern Pacific Co. v. Jensen, 244 U. S. 205. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable. The question is whether the decedent in this instance fell within that class."

and again

> "That is our concern here in construing this particular statute — the Longshoremen's and Harbor Workers' Compensation Act — with ap-

> propriate regard to its distinctive aim. We find little aid in considering the use of the term 'crew' in other statutes having other purposes. This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who although they might be classed as seamen (International Stevedoring Co. v. Haverty, supra), were still regarded as distinct from members of a 'crew.' They were persons serving on vessels, to be sue, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from this employees on the vessel who are naturally and primarily on board to aid in her navigation. See DeWald v. Baltimore & Ohio R. Co., 71 F. (2d) 810; Diomede v. Lowe, 87 F. (2d) 296; Moore Dry Dock Co. v. Pillsbury, 100 F. (2d) 245."

In *Warner v. Goltra*, 293 U. S. 155 (bottom page 157), (per Justice Cardoza), this Court held that a master of a vessel was aseaman, and declared that "in a broad sense, a seaman is a mariner of ny degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage'."

There is nothing in *Warner v. Goltra* which would give comfort to petitioners in their contention that these bargetenders are not seamen, for that decision extends the definition rather than limits it.

Nowhere in that opinion does the Court restrict the term "seamen" to persons employed on self-pro-

pelled vessels, but its every expression indicates an intention to show that all those employed upon vessels, whose duties are to further the enterprise of the vessel in commerce and to protect vessel and cargo from the perils of the voyage, are seamen under the law.

It will thus be seen that the definition of "seaman" under the decisions above quoted as well as Southern Pacific Co. v. Jensen, 244 U. S. 205 clearly bring the plaintiffs within that term, and plaintiffs are mistaken in their claim that a question of law is involved which has not been settled by this Honorable Court. (P. 4 of Petition for Certiorari.)

Nor is the case one of great gravity and importance since the statutes and decisions of other Courts, text books, dictionaries, as well as the evidence in this case, clearly bring these plaintiffs within the definition of "seamen."

CASES ARGUED CONTRA

The plaintiff has cited and argued the DeWald, Diomede and like cases involving the Longshoreman and Harbor Workers Act. These cases are clearly distinguished in our Brief in the Court below on pages 32 and 52. Appendix "A."

It will also be noted by reference to citations on pages 23-27 of Appendix "A" Brief that plaintiffs are in error in stating on Page 6 of their Supporting Brief to the effect that "in all of the definitions of 'seamen' it appears that one of the essentials is that to be a

seaman a person must be a member of the 'crew' of a 'vessel' * * *." On the contrary all of the definitions of "seaman" from whatever source clearly show that the term is given a broad meaning so as to include all persons concerned with the operation and protection of vessel and cargo engaged in commerce on the seas, which will include all of the navigable waters of the United States.

SAND AND GRAVEL DREDGE WORKERS EXEMPT

Since the institution of this suit, under date February 12th, 1940, in the matter of Smoot Sand & Gravel Corporation, the present Wages & Hours Administrator, Mr. Fleming, has held that persons operating dredges and other floating equipment of the Gravel Corporation, are "seamen," within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act. In his ruling the Administrator states:

> "I have given considerable thought to the question of whether employees operating the dredges and other floating equipment of the Smoot Sand and Gravel Corporation are seamen within the meaning of Section 13 (a) (3) of the Fair Labor Standards Act, and although the Solicitor's Office has expressed the view that those men probably are not seamen under that statute, I have not been able to agree with this opinion and consequently have reached the conclusion that such employees in the light of the factual data which your representatives have submitted, are seamen.

> "You understand, of course, that the Administrator's interpretation of the statute is subject to review by the courts, but I propose to adhere to this view unless at some future date my administrative construction is deemed erroneous by a court of competent jurisdiction."

We will attach a copy of this ruling to our Brief as Appendix "B."

It will thus be seen that Administrator Fleming is now following the decision in the Ellis case which we have referred to above.

In making this ruling the Commissioner has abandoned the main point of difference in Interpretative Bulletin No. 11 which made the distinction upon the question of whether the barges were self-propelled or were not self-propelled. While the conclusion of the Administrator in the Gravel Corporation case may be limited to the particular circumstances, one may reasonably conclude that if a worker on a sand dredge, stationed over a sand bank, whose operations largely consist in loading sand on a dredge or scow, may be considered by the Administrator to be a "seaman," that the barge-tenders in our cases, engaged at a monthly wage, assigned to and living on the barges, operating in commerce by the transportation of goods between separate harbors and different States, whose duties require them to keep the barge afloat, tend the lights

and ropes, and generally to protect and keep navigable the vessel (barge), and protect its cargo, will find much greater strength in the argument that they are "seamen."

It is also significant that after the ruling by Administrator Fleming, the case was argued in the Circuit Court of Appeals and the Department of Labor did not there file a Brief in support of the plaintiff's contention.

"NAVIGATION" DEFINED

Petitioners make a play on the word "navigation," contending that the bargetenders in these cases did not navigate the vessel.

When used in its restricted sense the word "navigate" may designate a captain or person who handles the course of a ship, but in its broad sense it applies to every person connected with a vessel whose business is to assist the vessel in safely reaching its destination with it cargo.

The word comes fro mthe latin term "navi"—a ship, and "agere" to go, or to drive; so that the bargetender in keeping his vessel afloat, tending the ropes, putting out running lights, pumping bilge, watching its cargo, and protecting the ship and cargo as it makes its voyage, is instrumental in the proper navigation of the vessel on its voyage and back to the home port, although he may not have directed its movements.

In our Brief in the Circuit Court of Appeals, Appendix "A," we overlooked *Fleming vs. Hawkeye Button Company*, 113 Fed. 2d, 22, cited on page 31 of petitioner's Brief. In the Fleming case the employer sought to extend the exemption from the Wages & Hours provisions, in catching fish and othr aquatic forms of animal life, and in propagating and processing such articles, to the exemption of persons engaged in making buttons from the shells of fresh water clams, and the Court held that the exemption should apply to the immediate operations rather than to the manufacturer of articles of commerce only remotely connected with the fishing industry, and limited the Fair Labor Standards Act to those purposes, which would seem to be altogether reasonable and in no way conflict in the argument we have advanced in this case.

It will be noted in numbered paragraph 16 of that opinion that the Court stated the exemption of agricultural labor from its operation could not be cited as argument in justifying such an exemption, since both Federal and State Governments have recognized a marked difference between industrial workers and agricultural laborers.

Applying the same rule to our cases, we submit that the State and Federal Governments of the United States, and every other civilized nation, have always recognized a marked difference between seamn, and all admiralty subjcts, and those persons who may be engaged in industrial enterprises on the land.

So marked is this distinction that Admiralty jurisdiction is reserved to the Federal Government in the Federal Constitution, and separate admiralty jurisprudence is set up in the Courts under distinct forms of pleadings and practice.

All of which is

Respectfully submitted,

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Service Acknowledged,
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March....., 1941.

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